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No. 92-8275

in the Supreme Court of the United States

February Term, 1994

STANLEY E. ADAMS
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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QUESTIONS PRESENTED

I.

WHETHER THE PLAIN LANGUAGE OF RULE 32 MANDATES THAT WRITTEN OBJECTIONS MADE BY THE DEFENDANT PRIOR TO SENTENCING TRIGGER THE DISTRICT COURT'S FINDING REQUIREMENTS UNDER RULE 32 (c)(3)(D)?

II.

WHETHER THE CASE LAW FROM THE SEVERAL CIRCUITS MANDATE THAT WRITTEN OBJECTIONS FILED BY THE DEFENDANT PRIOR TO SENTENCING TRIGGER THE FINDING REQUIREMENTS OF RULE 32 (c)(3)(D)?

III.

WHETHER IT IS NECESSARY TO INTERPRET RULE 32 AS BEING TRIGGERED BY WRITTEN OBJECTIONS PRIOR TO SENTENCING IN ORDER TO AVOID AN ABSURD RESULT?

IV.

WHETHER THE PETITIONER, IN THE INSTANT CASE, WAIVED HIS WRITTEN OBJECTIONS THAT WERE MADE PRIOR TO SENTENCING; OR WERE THESE OBJECTIONS

WAIVED BY COUNSEL; OR DID THE DISTRICT COURT MAKE SPECIFIC FINDINGS OF FACT AS REQUIRED BY RULE 32; OR WERE THESE OBJECTIONS NOT FACTUALLY ORIENTED AND THEREFORE, DID NOT TRIGGER THE FINDING REQUIREMENTS OF RULE 32?

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STANLEY E. ADAMS
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UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioner, Stanley E. Adams, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 13, 1993, and Petition for Rehearing denied October 15, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit entered on September 13, 1993 under the caption *United States v. Adams* was not printed due to local Rule 47.6. That determination is attached hereto in Appendix 1. Petition for rehearing was denied (Appendix 1A).

JURISDICTION

The judgement of the United States Court of appeals for the Fifth Circuit was entered on September 13, 1993. A petition for rehearing was sought and denied on October 15, 1993. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without Due Process of law*; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On August 7, 1990, the Defendant was named in a fourteen count indictment in the Western District of Texas. The Defendant, pursuant to a plea agreement, plead guilty to Count I, conspiracy to violate 18 U.S.C § 371 and Count X, violation of 18 U.S.C. §1006 on November 14, 1991. The remaining counts were dismissed pursuant to the plea agreement.

The Defendant raised several written objections to matters controverted in his pre-sentence investigation report (PSI). The Defendant's objections included several factually specific and important questions as to the accuracy of the allegations made in his PSI. These objections were filed in a "Motion to Correct Presentence Investigation Report" filed with the District Court on February 14, 1992. (Appendix 2). On February 20, 1992, sentencing was held in the United States District Court for the Western District of Texas before the Honorable James R. Nowlin.

At sentencing, the Defendant was represented by counsel. Counsel began the sentencing hearing by affirming that

the District Court had received a copy of the Defendant's written objections to the PSI. Counsel stated:

> MR. HAYNES: If the Court please, *we filed a written motion to correct the presentence investigation report under Rule 32 (c)(3)(D)*. And--but I-- and its a multi page, and it was filed I think yesterday.
>
> THE COURT: I've read it.
>
> MR. HAYNES: --if the court please. I don't know if it will assist the court for me to reread it, *but I would like to highlight some points...*
>
> THE COURT: All right. Go ahead.
>
> MR. HAYNES: *To supplement our position*, if the court please, I would like to offer for the court's consideration and as evidence in these sentencing proceedings what I've marked as Defendant's exhibits 6 and 7....(Appendix 3, Sentencing Transcript, pp. 3-4)

In addition, when the Court inquired as to whether or not the Defendant had any objections, the Defendant personally stated that he did in fact have several objections and that he believed the court had been made aware of these objections through the filing of the Motion to Correct the PSI. The Defendant stated:

> MR. ADAMS: There's quite a few things in it we don't agree with. *We have, I think, listed about sixty something*. They basically relate to the breadth the government has chosen to carry the conspiracy argument and the-- my involvement in trying to tie me into cases that I didn't plea to and assessing dollar figures there that we don't agree with.

> And that's the substance of our objection. And other than– I will say that their version of the facts is considerably different than our recollection. And since we didn't have a trial, certain aspects of those things never came out....(Appendix 3, S.T., pp. 2-3)

At sentencing, Mr. Haynes orally argued to remove the loss assessment statement concerning the DeSoto properties transactions (App. 3, pp. 6-8), the losses by Lamar Savings on the Parklane, Witte, DeSoto, and Poderosa properties (App. 3, p 11), and finally, counsel orally argued that (a) there were no losses and (b) if the Court found there were losses the Defendant should not be held responsible for amounts allegedly lost in transactions involving his codefendants and others which did not end in net losses to Lamar Savings. (App. 3, pp. 11-12, 14-16). These arguments resulted in the Court removing over $9,000,000 from the Defendant's Victim Impact portion of his PSI (App. 3, p. 19) and an order that the Defendant not be required to pay restitution (App. 3, p. 8). The Court refused to remove the $78,500 loss from the Remington House Apartments (pg. 7 of the PSI) transaction from the Defendant's PSI. (App. 3, p. 19).

After the above determinations, Judge Nowlin inquired as to any reason why sentence should not be passed. All parties answered in the negative. (App. 3, p. 26). The District Court then sentenced the Defendant to Four (4) years on Count I and four (4) years on Count X, concurrently, and a fine of $250,000. in addition, the Court ordered the Defendant to complete 500

hours of community service upon release. (App. 3, p. 28).

On March 13, 1992, the Defendant filed a Motion for Clarification of Rule 32 Motion. (Appendix 4). The Government responded (Appendix 5) and the Defendant replied to the Government response. (Appendix 6). The Defendant argued in his Motion for Clarification that the Court should rule on the several factors not addressed at sentencing and correct the matters that were ruled in the Defendant's favor at sentencing in the PSI. The District Court denied this Motion on April 16, 1992. (Appendix 7).

On April 24, 1992, Counsel for the Defendant supplemented his request for clarification on the Rule 32 Motion. (Appendix 8). Again, counsel argued that the matters controverted by the Defendant should be ruled upon due to the significant impact that the PSI would have on future dispositions such as supervised release hearings. On April 24, 1992, the District Court ordered that the appropriate correction be made to the Defendant's PSI in accord with the findings made on February 20, 1992 at the sentencing hearing. (Appendix 9). The District Court still refused to make any findings concerning any of the matters controverted by the Defendant in his written objections filed February 14, 1992.

The Defendant appealed his decision to the United States Court of Appeals for the Fifth Circuit on August 28, 1992. The Defendant raised two (2) issues on direct appeal:

1) Whether the District Court erred by not addressing the written objections made by the Defendant pursuant to Rule 32?

2) Whether the District Court erred in not attaching a written addendum to the Defendant's PSI to clarify the findings of fact made in regard to objections raised by the Defendant?

The Fifth Circuit Court of Appeals denied the Defendant's appeal, *per curiam*, on September 13, 1993. The Court did not print the decision pursuant to local Rule 47.5.

On September 23, 1993, the Defendant filed a Petition for rehearing *en banc* with the Fifth Circuit Court of Appeals. The Defendant argued one (1) issue:

1) Whether the written objections made by counsel before the sentencing hearing triggered the requirements of Rule 32 and counsel's conduct did not waive these objections?

The Fifth Circuit denied rehearing *en banc* on October 15, 1993. As a result of denying the petition for rehearing *en banc*, there is no published record as to why the District Court and the Fifth Circuit Court of Appeals decided that the Defendant had not triggered the Rule 32 requirements that every disputed sentencing matter either be decided to be true or deemed irrelevant to sentencing.

REASONS FOR GRANTING THE WRIT

The Several Circuits have agreed on the purposes, the evidentiary standards, and the requirements of Federal Rule of Criminal Procedure 32 (c)(3)(D). The Fifth Circuit has generally agreed with its sister Circuits on these three issues. However, in the instant case, the Fifth Circuit, by allowing the District Court to refuse to rule on several written objections made by the Petitioner prior to sentencing, has made a clear and erroneous break from the other Circuits. The case law clearly demonstrates that the several Circuits view written objections filed by defendants before sentencing as triggering the Due Process protections of Rule 32 (c)(3)(D). Despite this well settled point of law, the Fifth Circuit seems to take the opinion that no such protection is afforded written objections.

In the instant case, the Court of Appeals for the Fifth Circuit allowed a District Court to escape its duties under Rule 32 to either (i) make a finding of fact or (ii) determine that the factor will not be used at sentencing. By affirming the District Court's course of action, the Fifth Circuit held that written objections do not trigger the finding requirements of Rule 32. This holding would be in opposition to several Circuits' holdings that written objections do in fact provide the necessary notice to the Court that the defendant has found a problem within his PSI.

There are several reasons that the Fifth Circuits' position concerning this issue is untenable. First, the plain meaning of

the statute clearly indicates that written objections satisfy the requirement that the defendant alert the Court of any errors in his PSI. Second, the case law of the several Circuits' indicates that judicial interpretations of the aforementioned plain meaning clearly accept written objections as triggering Rule 32. Finally, an absurd result occurs when written objections are viewed as not triggering Rule 32. By allowing District Courts the discretion to just ignore written objections, one of the most important Due Process safeguards is removed. In effect, each defendant could be sentenced on the basis of materially untrue information which is clearly prohibited by the constitution and such cases as *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed.2d 1690 (1948) and *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 853 (1972).

I. The Plain Meaning of Rule 32 (c)(3)(D) Clearly Demonstrates That Written Objections Filed Before Sentencing Trigger The Finding Requirements of Rule 32 (c)(3)(D).

First, the plain meaning of the statute clearly indicates that written or oral objections can trigger the District Court's duties under Rule 32. Rule 32 (c)(3)(D) states:

> If the comments of the defendant and the defendant's counsel or testimony or *other information* introduced by them allege *any* factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court *shall*, as to *each* matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because

> the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons. (Emphasis added) F.R.Cm.P., Rule 32 (c)(3)(D) (1992).

The language of the statute is clearly mandatory. The statute states that the Court "shall" make one of the mandatory findings. In short, the Rule 32 finding to be made when a defendant objects to any portion of the PSI is not within the discretion of the district court, but instead is one of the obligations of the district court.

Moreover, in reference to what triggers these mandatory findings, Congress chose the term "any factual inaccuracy". Clearly this broad language was chosen to facilitate a range a ways that a defendant may object to his PSI. Under this broad language, written and oral objections may trigger the requirements of Rule 32. The key factor under Rule 32 is that the defendant alert the Court of specific, factual challenges he has to his PSI. As the Eighth Circuit stated in *United States v. Bartsh*, 985 F.2d 930, 933 (8th Cir. 1993), Rule 32 requires the defendant to alert the Court of his complaints. Once the defendant has alerted the Court, the prosecution must satisfy its burden of proof.

Finally, the fact that Congress chose to use the terms "the comments of the defendant..." , "testimony", and "other information introduced" to describe what sort mechanisms trigger

Rule 32 demonstrates Congress' intent to broadly define the types of words or actions by defendants that would trigger Rule 32. In fact, written objections could be considered to fall under "comments", "testimony", or "other information". The written objections are filed with the Court and therefore, must be considered under the definition of "other information" used by Congress in drafting Rule 32. The motion to file written objections is accompanied by an affidavit signed by the defendant and could therefore, be considered testimony. Finally, written objections could easily be construed as comments by the defendant. Therefore, the broad language chosen by Congress lends itself to the conclusion that Congress intended written objections to trigger Rule 32.

In addition to the broad and mandatory language of Rule 32 itself, references to Rule 32 also demonstrate that the plain meaning of Rule 32 allows written objections to trigger the finding requirements. Section 6A1.3(b) of the United States Federal Sentencing Guidelines states:

> The Court shall resolve disputed sentencing factors in accordance with Rule 32 (a)(1), Fed. R. Crim. P., notify the parties of its tentative findings and provide reasonable opportunity for the submission of oral *or written objections* before imposition of sentence. (Emphasis Added) Federal Sentencing Guideline Manual, §6A1.3(b), p. 338 (1992).

Clearly this policy statement issued by Congress purports to allow written objections to trigger Rule 32. In fact, this

statement by Congress seems to state no preference for oral or written objections. Congress has treated these types of objections as equals.

Therefore, the plain language of the statute, and the language of other statutes which reference back to Rule 32, clearly demonstrate that written objections suffice to trigger the finding requirements under Rule 32 (c)(3)(D). Congress drafted Rule 32 in such a manner that written objections clearly fall within the prescribed methods for alerting the sentencing court of errors. Moreover, once the court is alerted, its duty to make the proper findings under Rule 32 (c)(3)(D) is triggered.

II. The Case Law From The Several Circuits, Including The Court of Appeals For The Fifth Circuit, Clearly Indicates That Written Objections Made Prior to Sentencing Trigger The Finding Requirements of Rule 32 (c)(3)(D).

The Several Circuits have faced the issue of whether or not the filing of written objections before sentencing stands to sufficiently put the Court on notice of its duties under Rule 32. The resounding answer has been yes.

The several Circuits have agreed that written objections filed with the Court before sentencing do trigger Rule 32 requirements. *See United States v. Edgecomb*, 910 F.2d 1309, 1313 (6th Cir. 1990); *United States v. Montayne*, 996 F.2d 190, 192 (8th Cir. 1993) (written objections made before sentencing triggered prosecution's burden to prove sentencing factor by a

preponderance of the evidence); *United States v. Jones*, 1992 U.S. App. LEXIS 20[illegible] (9th Cir. 1992) (District Court made Rule 32 findings in reaction to written objections filed before sentencing); *United States v. Juarez*, 1F.3d 1250 (10th Cir. 1993) (District Court made expressed Rule 32 findings on written objections); and *United States v. Caraza*, 843 F.2d 432, 437 (11th Cir. 1988) (District Court made Rule 32 findings as to matters raised at sentencing hearing and matters raised in pre-trial motion).

In *Caraza*, the Court stated that it did not have to make findings on written objections not because they were not brought up at oral argument, but because the objections themselves did not question any fact of the case. *Id.* at 437. Similarly, the Ninth Circuit case of *United States v. Jones*, 1992 U.S. App. LEXIS 20798 (9th Cir. 1992) held that written objections triggered Rule 32 findings. In that case, the District Court made Rule 32 findings immediately upon presentation of written objections filed by the defendant. *Id.* at 3. Clearly, the Ninth Circuit does not require that written objections be made again at sentencing during oral argument in order to warrant the triggering of Rule 32.

Moreover, the Fifth Circuit has at least implicitly held that written objections trigger Rule 32 findings. *See United States v. Ramirez*, 963 F.2d 693, 706 (5th Cir. 1992) (Court only stated that defendant made written objections, no mention oral

argument). This year, in *United States v. Stouffer*, 986 F.2d 916, 927 (5th Cir. 1993), the Fifth Circuit expressly ruled on written objections that were denied by the District Court.

In the instant case, the Fifth Circuit has departed from this standard. In this case, the Fifth Circuit has allowed the District Court to skirt its duties under Rule 32 by not requiring any finding of fact concerning the several written objections that were not discussed orally at the sentencing hearing. This deviation sets a dangerous precedent and is clearly erroneous in light of the several Fifth Circuit cases which hold to the proposition that written objections trigger Rule 32. Moreover, this change in its reading of Rule 32 by the Fifth Circuit clearly is in opposition to the several other Circuits which have held that written objections trigger Rule 32.

First, the plain meaning of the statute clearly demonstrates that written objections trigger Rule 32 findings. The Several Circuits agree on this point. The Fifth Circuit's interpretation of Rule 32 is repugnant to Congress' intent as expressed by the broad and mandatory language used in the drafting of Rule 32. As already discussed, written objections may legitimately be considered "comments". "testimony", or "other information" under Rule 32 (c)(3)(D). Likewise, statutes which reference themselves to Rule 32 clearly indicate that written or oral objections suffice to trigger the requirements of the Rule.

Next, the Fifth Circuit's interpretation that written objections do not trigger mandatory findings under Rule 32 (c)(3)(D) is contradictory not only to the several other Circuit's decisions concerning Rule 32, but is also contradictory to the Fifth Circuit's own interpretations of Rule 32.

Clearly the facts of this case establish that the Defendant placed the District Court on notice of the fact that there were errors in his PSI. As the Eighth Circuit stated in *Bartsh*, the defendant only needs to alert the District Court of errors in the PSI in order to trigger Rule 32. *United States v. Bartsh*, 985 F.2d 930, 933 (8th Cir. 1993).

The Defendant sufficiently alerted the District Court of the inaccuracies contained in his PSI by filing written objections on February 14, 1992.

The Defendant filed factually specific objections to the PSI almost one week before sentencing. These objections (Appendix 2) stated specific grounds and factual allegations as to the inaccuracy of the Defendant's PSI. The Defendant alleged that amounts within his Victim Impact statement were incorrect, he alleged that the report used the term "sham loans" improperly. he alleged the report was inaccurate in calculating the interest lost from deals that he explicitly had nothing to do with, he objected to an amount of money that the PSI claimed he was given by a coconspirator, and he objected to several basic characterizations of himself in the PSI. In all, the Defendant

filed sixty-three written objections to the Presentence Investigation Report prior to sentencing. A careful review of these objections reveals that they were specific and factually related.

Under the Fifth Circuit's interpretation of Rule 32, the Defendant's failure to argue these objections again at sentencing constituted waiver of these objections. Therefore, under the Fifth Circuit's analysis, the District Court never was forced under Rule 32 to make specific findings. This interpretation is contradictory to the manner in which the Eleventh Circuit dealt with the problem in *United States v. Carraza*, 843 F.2d 432 (11th Cir. 1988). It is clear that Eleventh Circuit has held that written objections trigger Rule 32 and failure to readdress the specific objections at sentencing is immaterial. The requirements of Rule 32 must still be met by the sentencing court. Similarly, the Ninth Circuit case of *United States v. Jones*, 1992 U.S. App. LEXIS 20798 (9th Cir. 1992) cannot be harmonized with the Fifth Circuit's decision in the instant case.

Moreover, the Fifth Circuit's determination in the instant case cannot be harmonized with its own opinions and analysis in several other cases. For example, in *United States v. Ramirez*, 963 F.2d 693, 927 (5th Cir. 1992), the Fifth Circuit opinion states only that the defendant made written objections. Under this new interpretation of Rule 32, no Rule 32 issue could have even been raised on appeal if the defendant only filed written

objections. Under the Fifth Circuit's new interpretation of Rule 32, the District Court's duty to make findings would have never been triggered. These two results seem antithical. In *Ramirez*, the Fifth Circuit says that only written objections were filed. but Rule 32 was triggered, but in the instant case, the Fifth Circuit says that written objections alone do not trigger Rule 32. Clearly these positions cannot be harmonized.

Perhaps even more demonstrative of how the Fifth Circuit's determination in the instant case cannot be harmonized with its previous holdings is the recent case of *United States v. Nnanna*, 7F.3d 420 (5th Cir. 1993). In *Nnanna*, the District Court explicitly overruled several objections that were made in writing before sentencing. The Fifth Circuit decided that the District Court's handling of the written objections was adequate. *Id.* If the Fifth Circuit really held that written objections did not trigger Rule 32, then there would have been no issue for the Court of Appeals in *Nnanna* to address. The Fifth Circuit's decision in *Nnanna* demonstrates a division not only between the Fifth Circuit and its sister Circuits, but also a division internally relating to what the Fifth Circuit views as the proper law.

Therefore, the Fifth Circuit's disposition of the instant case is clearly at odds with not only the law of the several other Circuits, but is also at odds with the law within the Fifth Circuit. The other Circuits clearly require Rule 32 findings when a defendant makes written objections that relate to some factual

determination concerning the defendant's PSI. Moreover, it is clear that the previous decisions of the Fifth Circuit held to much the same rule concerning Rule 32 triggering.

In the instant case, the Fifth Circuit abandoned this rule and allowed the District Court not to make findings that were clearly required under Rule 32. Moreover, in subsequent cases, like *Nnanna*, the Fifth Circuit seemed to recognize an issue of law concerning Rule 32 requirements and written objections. The Fifth Circuit recognized that written objections trigger Rule 32. Therefore, it appears that the Fifth Circuit's disposition of this case is at odds not only with previous decisions of the several circuits, including the Fifth Circuit, but is also at odds with subsequent decisions made by the Fifth Circuit.

In conclusion, the plain language of Rule 32 clearly mandates an approach like the one adopted by the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits in which written objections trigger Rule 32 finding requirements. The Fifth Circuit itself has recognized this as being the correct choice both before and after the decision in the instant case.

III. The Fifth Circuit's Position That Written Objections Do Not Trigger Rule 32 Findings Leads To The Absurd Result That Defendants Could Be Sentenced on The Basis of Materially Untrue Information

Finally, the Fifth Circuit's determination in this case that written objections did not trigger findings under Rule 32 leads to

the absurd result that defendants may be sentenced on the basis of materially untrue information.

The result that defendants may be sentenced on the basis of materially untrue information can be illustrated by the Fifth Circuit case of *United States v. Charroux*, 3 F.3d 827 (5th Cir. 1993). The circumstances in *Charroux* are somewhat similar to those in the instant case. First, counsel in *Charroux* chose to file several written objections and then raised further, different objections at sentencing. *Id.* at 835. The District Court stated that it intended to overrule all the objections attached to the PSR (i.e. the written objections). *Id.* The Fifth Circuit declared that the District Court's handling of the written objections in the *Charroux* case was indeed acceptable under the Fifth Circuit's interpretation of Rule 32. *Id.*

Applying the law used in the instant case to the facts of *Charroux*, the District Court would not have to make any determination concerning the written objections. As such, counsel's choice to raise different objections at oral argument would render the written objections either waived or ineffectual. In either case, applying the law of the instant case, the written objections, since they were not reiterated at sentencing, did not trigger Rule 32. Despite the truthfulness, the accuracy, or the basis in fact of the matters controverted by the defendant, under the analysis of the Fifth Circuit in the instant case, these written objections could be accepted and used by the District Court

without any findings as to their accuracy or truthfulness.

Under the law as explained in the instant case, the defendant would lose his due process right to be sentenced on materially true information when his counsel alerted the Court as to errors in the PSI and then argued these errors before sentencing in the form of a written motion. All the due process protections of Rule 32 would then hinge on oral argument. This result is absurd and flies in the face of the purpose of Rule 32 and the plain meaning of the drafters of the Rule.

IV. The Defendant's Objections Were Clear And Factually Oriented and Were Not Waived By Counsel Or The Defendant As Alleged by The Prosecution.

The Fifth Circuit published only a one word opinion in response to the Defendant's request that the Court of Appeals order the District Court to make sufficient findings of fact concerning the Defendant's written objections. In response to this request, the government filed an appellee's brief which argued: 1) That the Petitioner's counsel waived the written objections at sentencing, 2) that the Defendant Himself waived the Objections at Sentencing, 3) That the District Court made Clear Findings of Fact as required by Rule 32, and 4) That the Petitioner's objections were not factually related.

The Petitioner can demonstrate that none of these alternative reasons are viable arguments for the District Court's

refusal to make findings of fact in accord with Rule 32 (c)(3)(D).

A. **The District Court Did Not Make Clear Findings of Fact Concerning All The Controverted Matters In The PSI.**

The government first argues that the Court did in fact make clear findings as required by Rule 32.

The Sentencing transcript (Appendix 3) makes it clear that the District Court did not make findings concerning all the objections made by counsel. The record clearly reflects that the Court only addressed those issues that the Defendant's counsel orally argued before the Court. The three issues which were argued by counsel were ruled upon by the District Court. However, there still remained some thirteen (13) objections as to the contents of the PSI.

Moreover, in response to defense counsel's motion to clarify the Rule 32 findings (Appendix 8) the District Court ordered that the corrections discussed orally on February 20, 1992 in open Court should be made to the Defendant's PSI. However, the Court noted at the same time it would not make any determinations concerning the written objections that were not discussed in Court at sentencing. (Appendix 9).

Therefore, it is clear that the District Court did not make any findings concerning the written objections that were raised before sentencing in the Defendant's Motion to Correct PreSentence Investigation Report.

B. **The Defendant's Counsel Did Not Waive The Written Objections Which He Did Not Orally Argue Before The Court.**

The government next contends that defense counsel waived the objections contained in the written motion to correct the PSI when he failed to argue some of the objections orally before the Court.

The government cited several cases which purportedly supported this contention that somehow an attorney could implicitly waive objections which he had filed written notice of before sentencing. The government points to the fact that defense counsel was not interrupted nor "cut off" from continuing his objections. *United States v. Velasquez*, 868 F.2d 714, 715 (5th Cir. 1989). Although a Court would be forced to resentence if the Judge decided that he had not heard enough and wanted to continue, this point has very little to do with the requirements that were triggered by Rule 32.

The government also argued the case of *United States v. Hatchett*, 923 F.2d 369 (5th Cir. 1991). In *Hatchett*, however, the District Court complied with Rule 32 by attaching an addendum to the defendant's PST explaining to all subsequent readers how the court had made its determinations regarding sentencing. *Id.* at 376.

The instant case is clearly different from *Hatchett*. In this case, there is no written record whatsoever concerning the District Court's determinations concerning the written objections

made by the Defendant through counsel prior to sentencing. Unlike the defendant in *Hatchett*, the Defendant in the instant case has no written explanation accompanying his PSI to subsequent readers. Therefore, one of the two main purposes of Rule 32 is frustrated by the government's contention that the failure on the part of defense counsel to orally urge his written objections constitutes an implicit waiver.

Moreover, in the instant case, defense counsel clearly did not explicitly waive the objections. At sentencing, the counsel premised his remarks by assuring himself that the District Court was familiar with his objections. After determining that the Court was familiar with the objections filed on February 14, 1992, counsel proceeded to proportion his time to the areas that he felt most important, namely the larger dollar amounts that were incorrectly allowed to be entered into the defendant's PSI. Counsel explicitly stated that he was supplementing, not changing, his position in regard to the previously admitted written objections. Clearly, defense counsel did not explicitly waive his written objections that were not argued at sentencing.

The instant case is analogous to the Sixth Circuit case of *Edgecomb*, *supra*. In *Edgecomb*, the Court found that even though defense counsel was addressed directly by the court and stated that he had no further objections, the Court was not relieved of its duty to make clear findings and determinations under Rule 32. *Edgecomb*, 910 F.2d 1309, 1314. This case

offers a similar set of operative facts. Although counsel did later state he had nothing further to present, the District Courts obligations under Rule 32 had already been established.

Similarly, in the instant case, the Court's duty under Rule 32 was not waived by defense counsel when the Court asked counsel if he had anything further to argue. The record for this case is complete with written objections that the Court was aware of and failed to rule upon at sentencing. Moreover, the Fifth Circuit Court of Appeals, by failing to properly resolve this issue and furthermore, by failing to even publish an opinion, allowed the requirements of Rule 32, and the protections afforded defendants by adherence to this Rule, to be thrown by the wayside. The Fifth Circuit, by condoning the action of the District Court, compromised the Defendant's Due Process rights to be sentenced on the basis of materially true information.

C. The Defendant Clearly Did Not Waive The Written Objections That Were Filed By Counsel Prior To The Sentencing Hearing.

The government next contended that the Defendant himself had personally waived the written objections to the PSI that were filed prior to sentencing.

The government position that Defendant Adams waived his previous objections is without merit. When defendant Adams was addressed by the Court, he unequivocally stated his position. Mr. Adams stated that he was under the impression

that written objections had been filed and that these objections were the basis of his argument. (Appendix 3, pp. 2-3). At no time during this discussion with the Court did Mr. Adams state that he intended to waive or remove his written objections from the record. In fact, Mr. Adams never explicitly stated that the three main objections that were orally argued by counsel were the basis of his argument. Mr. Adams did explicitly state that the **written** objections were his argument, not the oral argument objections which were only a fraction of all the objections raised by counsel.

Therefore, nowhere in the record can the government point to a statement by Mr. Adams that constitutes waiver of his written objections. In fact, the comments of the District Court continually lead counsel and Mr. Adams to believe that their written objections would be ruled upon as clearly required by Rule 32 (c)(3)(D).

D. The Defendant's Written Objections Were Specific And Clear And Therefore Should Have Been Afforded The Protections And Procedural Safeguards Of Rule 32 (c)(3)(D).

Finally, the government contended that the Defendant's written objections lacked specificity, went to tone of the PSI, and were not supported by rebuttal evidence.

The law regarding the evidentiary standard is clear. As stated above, the several Circuits, including the Fifth Circuit, agree that once the defendant has raised specific allegations of

inaccuracy, the Court must prove the truth of said statements by a preponderance of the evidence. *See United States v. Billingsley*, 978 F.2d 861, 866 (5th Cir. 1992). This point of law is well settled.

The government contended, in its brief, that the burden of proof is immediately placed upon the defendant to disprove the contested matters. *United States v. Rodriguez*, 897 F.2d 1324, 1327 (5th Cir. 1990), *cert. den.* __ U.S. __, 111 S.Ct. 158 (1990). The government's reliance on this case is completely unfounded. In *Rodriguez*, the government had already provided the Court with evidence validating the truth of a remark in the defendant's PSI. To hold the government reading of *Rodriguez* would be to allow the government to place blatantly unfounded allegations into the PSI and then force the defendant to disprove these lies. This is not what *Rodriguez* says or implies.

Moreover, the government cannot contend that the information contained in the PSI established the government's burden and then shifted the burden to disprove the assertion onto the Defendant. *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) *cert. den.* __U.S.__ ,113 S.Ct. 1592, 123 L.Ed.2d 157 (1993). The Fifth Circuit has explicitly stated that facts in the PSI, that are controverted, cannot serve as the sole basis for a sentencing decision. *United States v. Patterson*, 962 F.2d 409, 414-15 (5th Cir. 1992).

Clearly, the initial burden is on the government once a

sentencing factor is disputed. In the instant case, the government did not meet its burden. There was no discussion of the several written objections and the Court asked no questions nor made any determinations concerning these matters.

Next, the government contended that the Defendant's objections lacked merit because they were objections related to the tone of the PSI

This argument is also without merit. The objections made before sentencing deal with a variety of issues. Several of the objections concern alleged amounts that were included in the Defendant's Victim impact Statement. Since this section of the report helps to decide the Base Offense Level, then surely the government's contention that the Defendant's objections relate strictly to tone are untenable.

Moreover, the Defendant objected to several amounts that were included in his PSI regarding restitution amounts. And the attempts by the government to broaden the charges which the Defendant had pled guilty beyond those as set forth in the plea agreement. The Fifth Circuit explicitly held that the District Court must determine any restitutionary amounts that are disputed. *United States v. Cockerham*, 919 F.2d 286, 288 (5th Cir. 1990). Clearly, these objections must be subjected to Rule 32 findings under the Fifth Circuit's holding in *Cockerham*.

Finally, the government contended that the Defendant's allegations of error in the PSI were not specific enough to trigger

Rule 32.

The Fifth Circuit, like several other Circuits, has held that in order to trigger Rule 32 a defendant's allegations of error must be specific and involve questions of fact, not conclusions. *United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir. 1988). In short, the defendant may not trigger Rule 32 by generally objecting to the PSI.

In the instant case, the Defendant clearly made specific allegations concerning inaccuracies. The rule in *Hurtado* should only be applied to keep defendant's from abusing the system and unnecessarily delaying the passing of sentence. In the instant case, the Defendant made extremely specific allegations. He only desired to invoke his constitutional right of due process. However, by failing to make specific findings on the specific allegations made by the Defendant, he was denied this right.

CONCLUSION

The Defendant in the instant case has been denied the protections of Rule 32 (c)(3)(D) by the District Court's failure to make specific findings of fact concerning written objections made by the Defendant before sentencing. The Defendant's due process rights have further been infringed by the Fifth Circuit's refusal to order the District Court to make the required findings under Rule 32.

The Court of Appeals for the Fifth Circuit apparently held in this case that written objections made prior to sentencing did not trigger the finding requirements of Rule 32 (c)(3)(D). This position not only is repugnant to the plain meaning of the statute, it also flies in the face of the judicial interpretations concerning Rule 32 made by the several Circuits, including the Fifth Circuit both before and after its determination in this case. Finally, such a decision impermissibly restricts the protections put in place by Congress through its enactment of Rule 32.

Moreover, the reasons given by the prosecution, which we must believe made the basis for the Fifth Circuit's opinion, for the District Court being relieved of any duty to make factual findings are untenable. There is no evidence that the Defendant nor his Counsel at any time intended to waive the written objections made before sentencing. In fact, the statements of counsel prove that he viewed oral argument as a supplement to, not a replacement for written objections.

Therefore, the facts of this case demonstrate a developing split among the several Circuits concerning what is necessary to trigger the findings required under Rule 32. It is clear that the plain meaning and the purposes of Rule 32 are better served by the overwhelming majority of Circuits who hold that written objections trigger Rule 32 finding requirements the same as oral objections trigger such findings.

Wherefore the Petitioner, Stanley E. Adams, Jr. respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-8275

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STANLEY E. ADAMS, JR,
Defendant-Appellant..

Appeal from the United States District Court
for the Western District of Texas
(A-90-CR-117(1))

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge, and PICKERING*, District Judge.
PER CURIAM:"
AFFIRMED. See Local Rule 47.6.

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*District Judge of the Southern District of Mississippi, sitting by designation..

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-8275

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STANLEY E. ADAMS, JR.

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion), 5 Cir., ____, _____ F.2d _____

(October 15, 1993)

Before POLITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge and PICKERING*, District Judge.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the

Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel hearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge
Signed by Patt S. Higginbotham

*District Judge of the Southern District of Mississippi, sitting by designation.
REHG-8

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

versus

STANLEY E. ADAMS, JR.

CRIMINAL NO. A-90-CR-117(1)

MOTION TO CORRECT
PRESENTENCE INVESTIGATION REPORT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Defendant, STANLEY E. ADAMS, JR., through counsel, and pursuant to the Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, respectfully moves this Honorable Court for an Order striking or redacting the below-listed disputed statements from the Pre-sentence Investigation Report, which contain no indicia of reliability. As reasons and grounds therefore, the Defendant states as follows:

1. The Pre-sentence Investigation Report contains several factual inaccuracies, presumably offered by the

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government, which are not supported by evidence and, indeed, are contradicted facts, which the Defendant submits are known to the government. It is submitted that these inaccuracies, when relied upon by the Court in imposing its sentence pursuant to the Federal Sentencing Guidelines will result in a harsher and unjustified period of confinement being served by the Defendant. Further, it is submitted that these inaccuracies, when relied upon by the United States Parole Commission will result in the imposition of much higher parole guidelines for the Defendant than would otherwise be applicable.

2. The Pre-sentence Investigation Report unfortunately contains numerous erroneous, prejudicial statements that not only attempt to establish an improper dollar amount for the offense for which the Defendant should be held responsible by the United States Parole Commission for parole guidelines purposes, but which also imply that the Defendant was involved in the offense for which he has been convicted, in a much greater role than is truly the case. When taken in their entirety, the erroneous statement in the Pre-sentence Investigation Report will, the Defendant would respectfully

submit, adversely affect him not only at sentencing, but will also be relied upon by the Federal Bureau of Prisons in determining the Defendant's eligibility for various programs such as furlough, eligibility for community treatment center placement, and federal facility designation.

3. The Defendant disagrees with the majority of information set forth in the government's version of the offense as found in pages 3, 4, 5, 6 and 7 of the Pre-sentence Investigation Report. Due to a severe limitation of time, counsel is not in a position to go into as much detail as he would otherwise concerning these objections. However, the following constitutes a partial list of the matters to which the Defendant objects in the Pre-sentence Investigation Report.

A. In the "conspirators" section of the Pre-sentence Investigation Report at page 2, the first paragraph states "the direction and control." The Defendant strongly objects to this general statement as many of the actions of the alleged co-conspirators in this case were taken without knowledge, control, direction or supervision of the Defendant. Further, in his deposition, Merrick Leler testified that no one told him

to do anything improper with respect to transactions in question.

B. In the "offense conduct" of the Pre-sentence Investigation Report, the Defendant has the following objections:

1. In the second paragraph of this section, the Defendant objects to the use of the words "sham loan." Specifically, not only did Mr. Adams never cause any loans to be made, but he also never had discussions with any co-conspirators concerning the making of any type of "sham loans."

2. The Defendant objects to the statements contained in the fourth paragraph of the Offense Conduct Section. There was only one purported borrower (Reese) who brought to Lamar a purported nominee borrower (Robert Hayden Brown). Mr. Brown was not a nominee borrower as he had personal liability (as did Mr. Reese) on the DeSoto Loan. (This matter will be further discussed below). Mr. Brown

was dismissed from the instant case as a defendant by the Court as a result of a motion for judgment of acquittal.

3. The Defendant objects to the statement contained in the fourth paragraph of the offense conducts section which indicates "that some persons who acted as borrowers in this manner had no knowledge of the loan amount, interest rate or terms of repayment." If there is any evidence that this statement is accurate with respect to any loan transaction consummated by Lamar Savings, the Defendant had no knowledge of it and would not have condoned or permitted such loans to go forward had he had such knowledge. There was only one person who was purported as not knowing the loan amount. However, his first offer spelled out exactly what he expected and when the loan closed he received exactly what his offer set forth.

4. With respect to the DeSoto property

transaction, the Defendant objects to the statement contained at page 5 of the Pre-sentence Investigation Report that "he (Reese) had first acquired the land in 1983 for 5.2 million dollars and subsequently sold it to his own companies, Belgian American Investments & Trade, Inc. in 1984 for 11.6 million, and Euromont, Inc. on 6/29/85 for 18 million dollars." Belgian American Investments & Trade was not Luis Reese's company. It belonged to Hubert Flamant. Belgian American then sold the property to R. F. Partners (Reese and Flamant); the property then sold to Louis G. Reese, Inc. However, the deeds to R. F. Partners, to Euromont and to Luis G. Reese, Inc. were all recorded the same day - July 2, 1985. Further, from the point of view of the DeSoto transaction, there is no evidence that the Defendant was ever aware that Reese owned the property at the time the loan was made. Mr. Adams had never met Mr. Reese

and was not involved in structuring the transaction involving the DeSoto property. Additionally, Mr. Adams had no knowledge that Mr. Reese was using any of the funds from the sale of DeSoto to pay for the Witte Road tract and the Ponderosa Shopping Center.

5. With respect to the DeSoto Property, the Defendant controverts the losses alleged in the paragraphs found on pages 5 and 6. The property in question appraised for more than the amount that was loaned. The Defendant would also point out to the Court that co-defendant Perry was acquitted on this transaction and that there is no reason to believe that had the Defendant gone to trial that he would have been convicted of any wrong doing with respect to this loan transaction.

6. Additionally, the Defendant strongly objects to the inclusion of the DeSoto property transaction as well as the Parklane transaction

(found on page 6 of the Pre-sentence Investigation Report) in determining the amount of loss for which he should be held responsible for parole guidelines purposes. The only transaction to which the Defendant has pled guilty is the Remington House transaction which will be discussed below and it is the Defendant's position that to attempt to include him as a culpable co-conspirator and hold him responsible for alleged losses on transaction for which he has never pled guilty nor for which has he been convicted is a denial of his due process rights. The transactions in question took place without his knowledge, direction or participation.

7. The Defendant objects to the overall tenor of the Pre-sentence Investigation Report which implies that somehow his actions resulted in the failure of Lamar Savings. It is the Defendant's position that the government has neither charged or proved that Mr. Adams is

responsible for Lamar's failure. Therefore, this type of implication could have significant impact on any efforts he may later undertake with the United States Parol Commission concerning his release and/or status as a Federal Prison Inmate if he is sentenced to a term of active confinement.

8. The Defendant objects to the conclusion made in the Victim Impact Section of pages 7 and 8 of the Pre-sentence Investigation Report that the total loss which resulted from his offense activity was $9,265,829. Allowing the $9,265,829 figure to remain in the Pre-sentence Investigation Report will only serve to prejudice Mr. Adams, if not in the eyes of the court but later with the United States Parole Commission by implying that he is responsible for such a huge loss - especially in light of the fact that he has not pled guilty to or been convicted of any wrong doing in the DeSoto and Parklane Apartment transactions.

9. The Defendant controverts the alleged loss of interest of $254,246 with respect to the Parklane Apartment transaction as set forth on page 6 of the Pre-sentence Investigation Report. As discussed above, he has not pled guilty to this transaction nor is there any evidence that he knowingly participated in any wrong doing with respect to the Parklane Apartment loan. He did not approve of or know of the actions of Sidney Terry and Merrick Leler in regard to this loan.

10. With respect to the Remington House Loan transaction discussed on pages 6 and 7, the Defendant objects to the allegation that Lamar lost $785,342 in interest on this transaction. The Defendant objects to the statement contained at page 7 of the Pre-sentence Investigation Report that the Remington House apartment transaction incurred a loss of $78,750. In the V. Jay Parekh trial, the FDIC stated that there was no loss incurred to the

government as the result of the Remington House transaction. In fact, it is the Defendant's position a profit was actually made on the transaction. Additionally, the Defendant objects to the statement contained in the third paragraph at page 6 of the Pre-sentence Investigation Report that Parekh was "paid $78,750 by Lamar as an inducement for taking the property." The $78,000 fee paid to Mr. Parekh by Lamar was not an inducement for taking the loan, but instead, a brokerage fee for services rendered.

11. The Defendant objects to the statement contained at page 7 of the Pre-sentence Investigation Report that the total loss on the DeSoto, Witte and Ponderosa properties was $9,265,829.

12. The Defendant objects to the statement contained on page 7 of the Pre-sentence Investigation Report which implies that a $5,000 loss was incurred as a result of the Parklane

Apartment transaction.

13. In the evaluation section of the Pre-sentence Investigation Report at page 12, the Defendant objects to the statement that "once he and his co-conspirators realized that LSA was in trouble, they hid LSA problems form the Federal Home Loan Bank Board through a series of sham loans." As stated above, the only transaction to which the Defendant entered a plea of guilty is the Remington House loan transaction, and he vigorously objects to any allegations that indicate that he has been either found guilty or has pled guilty to a far reaching conspiracy with respect to the other loan transactions discussed in the Pre-sentence Investigation Report.

14. Under the section entitled "Sentencing Data" at page 12 of the Pre-sentence Investigation Report, the Defendant objects to an offense severity rating score of 6 and further objects to estimate of parole guidelines as

being 40-52 months. It is his position as stated above, that the alleged loss figure of $9,265,829 is based upon totally inaccurate information which has resulted in offense severity rating and the establishment of parole guidelines at a much higher level than otherwise should be the case.

15. The Defendant objects to statements found at the bottom of page 6 that indicate that with respect to the Remington House transaction that Mr. Parekh "had not submitted a loan request for this property since 1985" and that "he did not know the loan amount or the sales price." The facts are that LSA received a real estate contract including a request for a loan that was accepted by LSA in September, 1985. This contract included the loan amount of $15,750,000 and a payoff to seller of $14,654,028.49.

16. The Defendant objects to the statement of page 7 of the Report that with respect to the

Remington House transaction, Mr. Parekh did not escrow any monies for taxes on the property. Taxes for 1985 were paid by Mr. Parekh from the loan proceeds, 1986 taxes were not required to be escrow.

17. The Defendant objects to the statement concerning the $19,000 which Mr. Parekh gave to Mr. Coleman as being inaccurate. Mr. Parekh did not give $10,000 to Mr. Coleman. It was a loan that was paid back within three months. Mr. Gravelle, the FBI Agent involved in the case testified in Mr. Parekh's trial that the $10,000 was paid back in June, 1986.

WHEREFORE, for the foregoing reasons, it is respectfully prayed that an Order be issued striking and redacting each of the disputed sections of the Pre-sentence Investigation Report from the text of the Report in order that said information will not adversely affect the Defendant at sentencing, as well as with the Federal Bureau of Prisons.

Respectfully Submitted,

_____

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_____

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ATTORNEYS FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the 15th day of February 1992.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

versus

STANLEY E. ADAMS, JR.

NO. A-90-CR-117(1)
Austin, Texas
February 20, 1992

TRANSCRIPT OF PROCEEDINGS
SENTENCING PROCEEDINGS

BEFORE THE HONORABLE JAMES R. NOWLIN

APPEARANCES:

For the Government:

Mr. Dan Mills
Assistant U.S. Attorney
816 Congress, Ste., 650
First City Centre
Austin, Texas

For the Defendant:

Mr. Richard Haynes and
Mr. Michael Essmyer
Attorneys at Law
4300 Scotland
Houston, Texas 77007

Mr. Jim Mattox
Attorney at Law
P.O. Box 13223
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And that's the substance of our objections. And other than -- I will say that their version of the facts is considerably different than our recollection. And since we didn't have a trial, certain aspects of those things never came out. And perhaps at this point it's totally academic.

But anyway, there's quite a bit of the report on Pages 2 through 7 that we've -- don't agree with, and the second half of the review.

But other than that, it was -- we're prepared to go ahead.

THE COURT: Mr. Haynes, have you had an opportunity to review the presentence report?

MR. HAYNES: I have, your Honor.

THE COURT: Do you have any comments or corrections you want to make with regard to this report?

MR. HAYNES: If the court please, we filed a written motion to correct the presentence investigation report under Rule 32(c)(3)(D). And -- but I -- and it's multi page, and it was filed, I think, yesterday morning --

THE COURT: I've read it.

MR. HAYNES: If the court please. I don't know if it will assist the court for me to reread it, but I would like to highlight some points and perhaps get the input from counsel for the government to see if there can be some effective change made in the PSI at this time before the court announces sentence.

Sentencing Proceeding page 4

THE COURT: Al right. Go ahead.

MR. HAYNES: to supplement our position, if the court please, I would like to offer the court's consideration and as evidence in these sentencing proceedings what I've marked as Defendant's Exhibits 6 and 7. Tender a copy to counsel. I do not believe that there will be any objection to them.

(Instruments handed to Mills.)

MR. MILLS: If you're representing this was a supervisory agreement that was entered into --

MR. HAYNES: Yes, sir.

MR. MILLS: -- I have no objection to it.

THE COURT: Without objection, those exhibits are admitted into evidence for purposes of this hearing.

MR. HAYNES: Essentially, what they are, Your Honor, are the 17th of June, 1986, supervisory agreement entered into by and between the Lamar Savings Association and the FSLIC.

And the point -- that's Defendant's Exhibit 6. And Defendant's Exhibit 7 is the implementation agreement of that supervisory agreement.

And the point that I would like to make by offering these exhibits into evidence is that as of the time that the DeSoto property was taken back by Lamar Savings from Mr. Reese, as of that time, all the transactions that Lamar Savings could enter into were supervised and under the control of the FSLIC at the time. That is, that the government's officials were there on

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

MOTION FOR CLARIFICATION OF RULE 32 MOTION

COMES NOW, the Defendant, Stanley E. Adams, Jr. through counsel, who pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure files this motion requesting further findings of fact and clarification of the Court's order with respect to the Motion which was previously filed in the instant case asking the Court to make certain revisions to the Defendant's Pre-sentence Investigation Report and in support thereof states as follows:

1. As the Court is aware, pursuant to the Motion to Correct the Pre-sentence Investigation Report filed by the Defendant

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in accordance to the provisions of Rule 32 of the Federal Rules of Criminal Procedure, the Defendant prior to sentencing controverted a significant number of statements contained in the Pre-sentence Investigation Report.

2. At the sentencing hearing held on February 20, 1992, the Court made certain findings of fact with respect to some of the controverted matters but failed to make findings of fact as is required by Federal Rules of Criminal Procedure with respect to a majority of issues that were raised by the Defendant in his Rule 32 Motion.

3. As the Court will recall, during the course of the sentencing hearing held on February 20, 1992 the Court ordered that the Victim Impact Section of the Pre-sentence Investigation Report found on page 7 of the PSI be revised to delete therefrom everything with the exception of the reference to the Remington House Apartment transaction and the reference to the Defendant having settled the restitution amount through the FDIC. (See notes of testimony 2/20/92 at page 19 attached hereto as Exhibit A).

4. As the result of the Court's order, the United States Probation Office has made revisions to the Pre-sentence

Investigation Report amending the Victim Impact Statement as ordered by the Court and also deleting from the Victim Impact Statement the total loss figure of $9,349,579. However, the United States Probation Officer has not further corrected the Pre-sentence Investigation Report with respect to the information contained in the Evaluation Section at page 12 which is a recapitulation of information previously contained in the PSI. Specifically, the offense severity rating of 6 is still based upon the previously deleted $9,349,575 figure and has not been modified to a category 4 severity rating which would be consistent with the $78,750 figure which now appears in the Victim Impact Statement. Additionally, page 12 of the Pre-sentence Investigation Report still reflects the Defendant's parole guidelines as a range of 40-52 months (which is based upon the previously excised figure of $9,349,579) instead of the new guideline range of 12-18 months which should apply based upon the $78,750 figure which the Court ordered be utilized in the Victim Impact Statement.

Therefore, in the interim while the Court is making its decision as to the ruling it will issue concerning the remaining controverted matters in the presentence investigation report,

in order to insure that the Pre-sentence Investigation Report in its entirety be revised to consistently reflect both the spirit and the letter of the Court's prior order, it is requested that this Court issue an order directing the United States Probation Office to further revise the Pre-sentence Investigation Report as follows:

a. At page 12 of the Pre-sentence Investigation Report in the Sentencing Data Section it is requested that the Court order that the offense severity rating for the Defendant's case be changed from Category 6 to Category 4 in order to be consistent with the Court's previous finding of $78,750 in damages resulting from the Defendant's participation in the instant offense.

b. At page 12 of the Pre-sentence Investigation Report under the Sentencing Data Section, it is requested that the Court order the United States Probation Office to revise the Pre-sentence Investigation Report to change the guidelines for United States Parole Commission purposes from the 40 to 52 month range currently indicated in the Pre-sentence Investigation Report to 12 to 18 months to be consistent with the Defendant's revised severity rating of 4

and correct salient factor score of 10.

Respectfully Submitted,

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Facsimile No. (512) 478-2044
State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the ____ day of March, 1992.

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CRIMINAL NO. A-90-CR-117(1)

GOVERNMENT'S RESPONSE TO DEFENDANTS
RULE 32 CLARIFICATION MOTION

Comes now the United States and urges a revision of the Pre-Sentencing Investigation. The United States would urge that Defendant Adams is attempting to dupe the court as the court once stated had been done to Vijay Parekh by Defendant Adams. By urging that there is no loss to Lamar Savings, as Defendant Adams claims, Defendant Adams makes false factual assertions that require a rejoinder as contemplated by the last sentence of paragraph four of the plea agreement.

The United States is aware that the court knows that

co-conspirators are liable and culpable for the acts of their co-conspirators. Pinkerton v. United States, 328 U.S. 640 (1946). As Defendant Adams pleaded guilty to the conspiracy charge of the indictment, he became culpable for all foreseeable acts of his co-conspirators, including those committed by Coleman and Perry. As the court is aware, the jury convicted on three loan transactions which included the Parklane loan, the Remington House loan, and the DeSoto (Ponderosa & Witte) loans. Defendant Adams' signature appears on all loan approval sheets for these loans which involved the misapplication (according to a jury verdict) of approximately $80,000,000.00 of federally insured funds. The court should also remember that the $54,000,000.00 DeSoto loan was the product of the Raddison group, a company consisting of Bill Benton who was a close personal friend of Defendant Adams. Testimony from Lee Horton, one of the Raddison partners, indicated meeting with Defendant Adams regarding the placing of loans and need to remove scheduled items. After this meeting, Horton approached Defendant Reese and the DeSoto loans were structured. Clearly, Adams is responsible as a co-conspirator as the court is aware

based upon Adams' management and control of Lamar Savings and his involvement by approving all the loans that were found to be misapplication of bank funds.

Defendant Adams attempts to have the court participate in a "sham" pre-sentence report in an effort to dupe the Parole Commission by including numerical indices relating to restitution that do not completely indicate the true magnitude of Defendant Adams' criminal conduct. A complete and truthful report would indicate Defendant Adams was not required to make restitution of $9.3 million (DeSoto loan, finding of the court in reference to Reese, Perry and Coleman) due only to the fact that Defendant Adams settled a civil lawsuit in which he paid the Federal Deposit Insurance Corporation (FDIC) approximately $7,000,000.00 and in exchange obtained a release from the FDIC as to all claims the FDIC may have had against Defendant Adams and his family. Defendant Adams will argue he was not convicted of the DeSoto loan transaction, but Defendant Perry was found to be responsible for restitution on the DeSoto loan (even though he had not been convicted of misapplying or making false entries relative to those counts in the indictment) as the

court correctly held Perry culpable and liable under Pinkerton, supra.

A complete and truthful Pre-Sentence Investigation should contain the whole truth and include for severity rating purposes that Defendant Adams, as a co-conspirator, plead guilty to a conspiracy charge that involved the misapplication of $80,000,000.00. This would be in accord with United States v. Cockerham, 919 F.2d 286, 289 (5th Cir. 1990). In Cockerham, the court found "loss to the victim" to be the value of the property taken and to include the value of all property taken, even that recovered or returned. Thus, the "loss" was the $80,000,000.00 misapplied, not the restitution being urged by Defendant Adams which is identical to the argument rejected in Cockerham.

Therefore, the United States urges the Pre-sentence Investigation be amended to show a $80,000,000.00 misapplication/loss with no restitution required due to Defendant Adams' compromise and settlement of a civil law suit with the FDIC where the FDIC was paid approximately $7,000,000.00

The truth, the whole truth, and nothing but the truth

should be included in the Pre-Sentence Investigation.

Respectfully Submitted,

DONALD F. EDERER
United States Attorney

DAN H. MILLS
Assistant U.S. Attorney
816 Congress Ave.
Suite 650
Austin TX 78701
A/C 512/482-5858
State Bar No. 14152500

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Government's response has been sent by United States Mail on this the 18th day of March, 1992, to:

Burrell D. Johnston
1108 Nueces
Austin, Texas 78701

DAN H. MILLS
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CRIMINAL NO. A-90-CR-117(1)

ORDER

Came on to be considered Defendant Adams' Motion for Clarification of Rule 32 Motion and the court having considered said motion and the response of the Government, hereby

ORDERS the Defendant Adams' motion should be DENIED.

SIGNED and ENTERED this _____ day of _____, 1992.

Date: _____

_____
UNITED STATES DISTRICT JUDGE

TO BE FILED UNDER SEAL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S RULE 32 CLARIFICATION MOTION

Comes now the Defendant, Stanley E. Adams, Jr. through counsel, who submits his reply to the Government's response to his Motion for Clarification of Rule 32 Motion and states as follows:

1. In considering this reply to the Government's response to the Defendant's motion, counsel for the Defendant would respectfully urge the Court to consider the language contained in paragraph 4 of the Defendant's plea agreement which specifically states in part as follows:

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> "The United States Attorney for the Western District of Texas agrees that it will not speak at sentencing regarding any recommendation as to what sentence, fine or other matters should be imposed by the Court. . . .The agreement to remain silent as to sentencing recommendations includes, but is not limited to the type of sentence under 18 USC Section 4205, or the severity rating dollar factor. The United States Attorney for the Western District represents that there is no restitution due and owing to the FDIC due to their settlement in the civil case with Defendant Adams and his family. The United States understands that Defendant Adams will urge the Court, the Probation Department, and the Parole Commission to consider the evidence in the current case the same as that found by the Court in its order in Cause No. A-89-CR-147. The Defendant will assert that as shown in the findings Court's order of May 31, 1990 in Cause No. A-89-CR-147 that "there was no loss to Lamar Savings as a result of this (Remington) loan transaction" in regard to the dollar factor for severity rating as that term is used by the United States Parole Commission or for any other purposes."

It is the Defendant's position that just as occurred during the course of the sentencing hearing when AUSA Mills attempted to dupe the Court into inserting into the PSI additional dollar factors beyond that which was stipulated in the plea agreement with the Defendant (see notes of testimony 2/20/92 at page 13 and 14) that counsel for the Government has <u>again</u> violated the terms of the Defendant's plea agreement as the result of the inaccurate and erroneous

allegations made in the Government's reply to the Defendant's motion. The record in the instant case clearly indicates that it was specifically agreed at the time of the Defendant's entering his plea of guilty and spelled out in the plea agreement that the United States understood that the Defendant would urge the Court, Probation Office and the Parole Commission to consider the evidence in the current case to be the same as that found by the Court in its Order in Cause No. A-89-CR-147. Additionally the Defendant's motion to clarify the Court's findings with respect to its Rule 32 Motion is simply asking the Court to order that the Pre-sentence Investigation Report be ordered to be changed throughout the document to be consistent with the findings already made by the Court on the record.

For the Government to now argue that there were significant losses to Lamar Savings that should be inserted into the PSI and to allege that the Defendant is "attempting to dupe the Court" and to have the Court participate in what the Government characterizes as a "sham" pre-sentence report in an effort to dupe the Parole Commission" not only is an insult to the findings previously made by the Court but a clear

violation of the terms of the Defendant's plea agreement.

2. The government entered into a plea agreement with the Defendant upon which the Defendant relied when he agreed to enter his plea of guilty in the instant case in which the Government clearly understood that it was the Defendant's position that for purposes of determining the Defendant's parole guidelines by the United States Parole Commission that the only dollar factor involved would be the $78,500 loss alleged in the Remington House transaction. Additionally the Government was clearly aware that it agreed with the Defendant that there was no loss to Lamar Savings as a result of the Remington loan transaction.

For the government to now attempt to circumvent and render invalid for Parole Commission consideration purposes the findings of fact previously made by this Court pursuant to Rule 32 of the Federal Rules of Criminal Procedure and for the government to attempt to render the promises made to the Defendant in the course of his plea negotiations to be meaningless not only constitutes bad faith on the part of the United States but further indicates the continuing vendetta which the United States is maintaining against the Defendant

notwithstanding the agreement which the United States entered into which it now seeks to ignore.

WHEREFORE, in view of the foregoing and the Memorandum of law appended hereto, the Defendant would respectfully move that the Court deny the government's request that the Pre-sentence Investigation Report be amended to show a $80,000,000 misapplication/loss figure and would renew its request that the Court issue an order as requested in the Defendant's Motion for Clarification amending page 12 of the Pre-sentence Investigation Report in order that the Pre-sentence Investigation Report throughout be consistent with the findings of fact previously made by the Court on February 20, 1992.

Respectfully Submitted,

Burrell D. Johnston
1108 Nueces
Austin, Texas 78701
Telephone No. (512) 478-7381
Facsimile No. (512) 478-2044
State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the _____ day of March, 1992.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE
TO DEFENDANT'S MOTION FOR CLARIFICATION

As the record in the instant case reflects, the Defendant, pursuant to a previously filed motion which was submitted in accordance with the provisions of Rule 32 of the Federal Rules of Criminal Procedure has asked the Court to make certain additional clarifications to the Pre-sentence Investigation Report in order to insure that the Pre-sentence Investigation Report throughout the document contains statements which are consistent with the findings of fact made by the Court on February 20, 1992 prior to the Defendant's sentencing with respect to the dollar factor

involved in the instant offense. After having filed the Motion for Clarification, the government responded urging the Court to include additional dollar factors in the Defendant's Pre-sentence Investigation Report which are totally inconsistent with the findings of fact made by the Court. Additionally, the Government in its response has alleged that the Defendant is asking the Court to participate in the preparation of a "sham" pre-sentence report in "an effort to dupe the Parole Commission" by including information in the Pre-sentence Investigation Report that did not "completely indicate the true magnitude of Defendant Adams' criminal conduct." The United States has also asked the Court in its reply to the Defendant's motion to amend the Pre-sentence Investigation Report to show a dollar factor of $80,000,000 as opposed to the $78,500 figure set forth in the Pre-sentence Investigation Report and determined by the Court prior to sentencing to be the appropriate dollar loss figure.

It is the Defendant's position that not only are these allegations by the government erroneous but they also are contrary to and in violation of the spirit of the letter of the Defendant's plea agreement which clearly set forth that the

United States agreed that the dollar factor for Parole Commission guideline purposes would be the loss involved in the Remington House transaction ($78,500) and that there was no loss to Lamar Savings as a result of the Remington loan transaction to which the Defendant pled guilty.

In the civil arena it has long been established that "the trial court has power to summarily enforce on a settlement agreement entered into by the litigants while the litigation is pending before it." Autera v. Robinson, 419 F.2d 1197, 1200 (D.C. Cir. 1969). These long-accepted principles of civil litigation have been given increasing recognition recently in the criminal context as the courts have come explicitly to recognize and encourage the "plea bargaining process". The Supreme Court first dealt with the issue in Santobello v. New York, 404 U.S. 257 (1971), where it held that due process entitles a defendant to relief when the state breaches a promise made to him in exchange for a guilty plea. The Santobello case has evolved over a decade in all circuits so as to become synonymous with the concept of adjudicating disputes over broken plea agreements. It is now Hornbook Law that plea agreements are contracts and that each

agreement stands on its own upon the facts in each case, and that defendants are entitled to what is reasonably due them under specific performance based upon the circumstances of the government's promise and its breach of the terms.

In the instant case, Defendant has clearly demonstrated that not only was he promised in his plea agreement that the government would agree to the dollar factors stipulated with respect to the Remington House transaction but that also the government would remain silent with respect to matters relating to the urging of the Defendant to establish a $78,500 factor for severity rating purposes with the United States Parole Commission. The Defendant has shown reliance upon these promises made by the government. He has upheld his end of the bargain by entering his plea of guilty and providing cooperation to numerous jurisdictions throughout the United States. Accordingly, the Defendant would respectfully ask the Court to insure that the promises made in his plea agreement are enforced.

The Defendant would refer this Court to Cooper v.

United States, 594 F.2d 12 (CA 4 1979) at page 17:

> "Conduct by government prosecutors that in the market place would constitute breach of contract or give rise to promissory estoppel will practically always reflect constitutionally unfair conduct in transactions between sovereign and citizens in matters of liberty and punishment."

In the instant case, not only has the Defendant entered his plea of guilty but, true to his promises made in the plea agreement has been cooperating fully with federal authorities and numerous federal jurisdictions concerning investigation about which he had knowledge.

The Fifth Circuit Court of Appeals in the case of Roe v. Griffin, 676 F.2d 490 (1981) compared the plea bargaining rights of a defendant under Santobello where a defendant "a due process right to enforcement of the bargain" to promises made by the government of immunity from prosecution. At page 496, the court stated:

> "When such a promise induces a defendant to waive his Fifth Amendment rights...to otherwise cooperate with the government to his detriment, due process requires that the prosecutor's promise must be fulfilled. We hold that once a defendant's good faith compliance with the terms of the agreement is established, the state must perform on its side and any attempts to breach the agreement is per se, a bad faith prosecution."

In United States v. Mooney, 654 F.2d 482 (CA 7 1981) the court stated, "A plea bargain is a contract; the terms of which must necessarily be interpreted in light of the parties' reasonable expectations. The resolution of each case depends upon the essence of the particular agreement and the government's conduct relating to its obligations in the case."

In the instant case, the Defendant's plea rested upon and was induced by the government's promises with respect to the dollar factor that would be utilized for parole guidelines purposes and he clearly relied upon this promise in pleading guilty as well as in providing further cooperation to federal authorities.

In United States v. Baylin, 696 F.2d 1030 (CA 3 1982) the court states, "And we urge the government to make every effort to draft unambiguous plea agreements." Also see: United States v. Cook, 669 F.2d 317 (CA 7 1987), "The government may not rely upon favorable judicial construction to cure significant ambiguities in its plea agreements. Plea agreements need to be carefully drawn and understood by all parties."

The courts have held that where the plea agreement is reasonably understood by the defendant to provide certain promises which are not fulfilled, that the defendant is denied due process. In United States v. Crusco, 536 F.2d 21 (CA 3 1976) the court states, at page 27: "The government may reach the port in the plea bargaining process, but founder there because of careless or loose language in its commitment." In its decision the court further states that where "circumstances as they existed at the time of the guilty plea judged by objective standards, reasonably justified his mistaken impression" the defendant may be held to have entered his plea without full knowledge of the consequences and involuntarily.

In United States v. Roberts, 570 F.2d 999 (1066) (CA D.C. 1979) the court states: "The government will not be allowed to avoid the obligation it incurred claiming now that the language literally promises nothing to the defendant. A plea agreement is not an appropriate context for the government to resort to a rigidly literal approach in construction of language."

The Defendant would also refer the Court to the case

of Lockhart v. Holiday Homes, 678 F.2d 1176 (1982) in footnote 8, at page 1185 where the court states that in interpreting the terms of a contract, the test is: "the common usage of other men in like circumstances. Or, what would a reasonable man in the same circumstances understand?"

In the case of United States v. Robertson, 582 F.2d 1356 (1978) the court held that the accused's state of mind is critical in determining the court's interpretation and enforcement of a plea agreement. The court then established the following two-tiered test:

a) Whether the accused exhibited an actual subjective expectation to negotiate a plea;

b) Whether the accused's perception of the negotiations and discussions was reasonable under the circumstances.

The Defendant clearly meets this test on both points. Based upon the fact that he has continued to provide full cooperation to the United States in numerous jurisdictions throughout the United States, Defendant would submit that the government cannot have it both ways - inducing him on the one hand to cooperate multi-jurisdictionally while, on the

other hand, going against the terms of his plea agreement by urging the Court to make significant modifications in the Pre-sentence Investigation Report which will have major adverse effects upon him with respect to his efforts to obtain release on parole - especially in view of the fact that the Court has sentenced him pursuant to the provisions of Title 18 USC Section 4205(b)(2). Were the Court to permit the government to be successful in its latest endeavors in this regard, it would certainly render the terms of his plea agreement and the promises made to the Defendant in order to induce his plea of guilty meaningless.

The case of United States v. Herman, 544 F.2d 791 (CA 5 1977) at page 797, very aptly describes the conduct of the government in the instant case where the court states:

> "If Congress had wanted plea bargaining to be formalized or structured, the rules could have been so provided. But Congress, believing that plea bargaining is a necessary ingredient in the criminal process, wanted an accused freely to discuss his or her plight. Congress did not intend that the accused by convicted out of the bargaining words Congress had encouraged him or her to utter. We cannot ascribe to Congress any intention to sand bag an accused in his or her plea bargaining sessions. The government, as one of the dancing partners, should not be able to lead its partner to a trap door in the dance floor."

(Emphasis added)

The Defendant has confessed his culpability in the instant case and has cooperated fully during the past three months in good faith. He has never stopped cooperating with the government and he continues to stand ready, willing and able to continue to do so. As of the filing of this pleading, he currently has scheduled with the Federal Bureau of Investigation from Dallas, Texas a debriefing for April 8, 1992 and additionally has scheduled with the Federal Bank Task Force in Dallas the first of what is believed to be a number of ongoing debriefings commencing on Monday, March 30, 1992.

In view of the foregoing, the Defendant would respectfully request the Court to grant his motion with respect to further clarification of his Pre-sentence Investigation Report and to deny the government's request for further additions to be made to the Pre-sentence Investigation Report of erroneous, prejudicial information in order to insure that the promises made by the government in its plea agreement upon which he relied in entering his plea of guilty and in providing his cooperation are kept.

Respectfully Submitted,

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State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

versus

STANLEY E. ADAMS, JR.

CRIMINAL NO. A-90-CR-117(1)

ORDER

Before the Court is the Defendant Adams' Motion for Clarification of Rule 32 Motion, filed March 13, 1992. Having reviewed and considered this motion and the Government's response and the Defendant's response to the Government response, the Court is of the opinion that the motion should be DENIED.

It is ORDERED that Defendant Adams' Motion for Clarification of Rule 32 Motion, filed March 13, 1992 is hereby

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DENIED.

SIGNED AND ENTERED this 16th Day of April, 1992

James R. Nowlin
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

vs

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

SUPPLEMENT TO MOTION TO CORRECT PRE-SENTENCE INVESTIGATION REPORT

TO THE HONORABLE JUDGE JAMES R. NOWLIN:

COMES NOW the Defendant, Stanley E. Adams, Jr., through counsel, and pursuant to Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, files a supplement to the Motion to Correct Pre-sentence Investigation Report which was filed on February 14, 1992 and is currently pending before the Court and in support thereof states as follows:

1. As the record in the instant case reflects, after receiving the Pre-sentence Investigation Report and reviewing it with counsel, the Defendant outlined to counsel numerous

areas of the Pre-sentence Investigation Report which he controverted as being erroneous and without any basis in fact. Counsel then attempted to informally resolve these objections with the United States Probation Office and after being unsuccessful in attempting to do so, on February 14, 1992 filed a motion to correct pre-sentence investigation report in which seventeen objections were raised with respect to the contents of the Pre-sentence Investigation Report.

2. At the sentencing hearing held on February 20, 1992, the Court made findings of fact with respect to only several of the objections listed in the Defendant's Rule 32 Motion but neglected to make findings of fact concerning the remaining balance of said objections.

3. As a result of the findings of fact made by the Court prior to sentencing, the United States Probation Office did make certain revisions to page 7 of the Pre-sentence Investigation Report but made no further modifications of any other portion of the Pre-sentence Investigation Report.

4. Accordingly, on March 13, 1992, the Defendant filed through counsel a pleading entitled Motion for Clarification of Rule 32 Motion, in which the Court was asked to order the

United States Probation Office to make further changes on page 12 of the Pre-sentence Investigation Report to render said report consistent with the changes made by the United States Probation office on page 7 of the Pre-sentence Investigation Report.

5. On April 6, 1992, the Court issued its order denying the Defendant's Motion for Clarification of Rule 32. However, the Court failed to issue any further rulings with respect to the Motion for Modification of Sentence previously filed on February 14, 1992 and the numerous additional objections to the Pre-sentence Investigation Report which is still pending before the Court.

6. On April 13, 1992, the Court issued an Order directing the Defendant to surrender himself and begin serving his sentence at the place and time designated by the Federal Bureau of Prisons. Since the issuance of the aforementioned order on April 13, 1992, the Defendant's counsel has been advised that the Defendant has been designated to a federal prison institution at Texarkana, Texas and the Defendant is to report on April 29, 1992.

7. As a result of the foregoing, and in order to be able to

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

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receive due process in his efforts to obtain parole with the United States Parole Commission, the Defendant files this Supplemental Motion to his Original Motion to Correct Pre-sentence Investigation Report. The Court will recall that at the time of the Defendant's sentencing, the Court made a finding of fact as to the dollar amount involve din the offense for parole guideline purposes as being $78,500. Notwithstanding this fact, there are numerous other statements contained in the Pre-sentence Investigation Report which to this date have not been addressed by the Court as required by Federal Rules of Criminal Procedure, Rule 32 and which, if relied upon by the United States Parole Commission, very possibly could result in the imposition by the United States Parole Commission upon the Defendant of much greater parole guidelines than otherwise would be the case were the United States Parole Commission to rely upon the Court's finding of $78,500. Accordingly, the Defendant would submit that, in view of the fact that the Court has not yet held an evidentiary hearing with respect to those matters, that it is totally appropriate for the Court, in accordance with the provisions of Rule 32 of the Federal Rules of Criminal Procedure, to now

make ruling with respect to those other objections to the Pre-sentence Investigation Report which are still outstanding in order that the Pre-sentence Investigation Report can be finalized.

8. Additionally, as the Court is aware, pursuant to the Defendant's plea agreement, the United States agreed to remain silent at sentencing with respect to the issue of the severity rating dollar factor for parole guideline purposes to be utilized by the United States Parole Commission. The plea agreement in paragraph 4 specifically sets forth that the United States understood that the Defendant would urge the Court, the Probation Department, and the United States Parole Commission to accept an amount precisely the same as that found by the Court in its order in Cause No. A-89-CR-147. Notwithstanding this fact, the United States has continued to attempt to breach the promises made to the Defendant in its plea agreement by causing the FDIC to provide two separate letters to the Court which attempt to raise the dollar factor involved for parole guideline purposes beyond the $78,500 figure previously ordered by the Court. Additionally, as the Court is also aware, in the government's

response to the previously ruled upon Motion for Clarification, the government even went so far as to ask the Court to amend the Pre-sentence Investigation Report to show a $80,000,000 loss figure - gain in violation of the Defendant's plea agreement. In view of the foregoing, the Defendant would ask the Court to issue an order to the office of the United States Attorney and any other agencies of the United States government to cease and desist from further attempts to distort the Records of the Bureau of Prisons and the United States Parole Commission by forwarding to either the United States Parole Commission or the Federal Bureau of Prisons any additional information or documentation which is contrary to the Court's findings of fact that the dollar amount involved in the Defendant's offense was $78,500.

WHEREFORE, for the foregoing reasons, it is respectfully prayed that an Order be issued striking and redacting each of the remaining disputed sections of the Pre-sentence Investigation Report from the text of the report in order that said information will not adversely effect the Defendant in his efforts to obtain due process with the United States Parole Commission and with the Federal Bureau of

Prisons. It is also respectfully prayed that an Order be issued directing the United States Attorney and any other government agency to cease and desist from forwarding any other materials to the Federal Bureau of Prisons or the United States Parole Commission which may be inconsistent with the findings of fact made by the Court on February 20, 1992, concerning the dollar factor involved in the Defendant's offense for parole guidelines purposes and in violation of his plea agreement.

Respectfully Submitted,

_____

Burrell D. Johnston
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Telephone No. (512) 478-7381
Facsimile No. (512) 478-2044
State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the 24th day of April, 1992.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

ORDER

Came on to be heard the Supplement to Motion to Correct Pre-sentence Investigation Report, and the Court having considered the motion and the Government's response thereto, finds that the motion does have merit, and it is hereby GRANTED.

It is hereby ORDERED that each of the remaining disputed sections of the Pre-sentence Investigation Report be stricken from the text of the report.

It is FURTHER ORDERED that the United States Attorney and any other government agency cease and desist from forwarding any other materials to the Federal Bureau of

Prisons or the United States Parole Commission which are inconsistent with the findings of fact made by this Court on February 20, 1992 concerning the dollar factor involved in the Defendant's offense.

SIGNED AND ORDERED on this _____ day of _____, 1992.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

versus

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL MOTION TO CORRECT PRE-SENTENCE INVESTIGATION REPORT

Federal Rule of Criminal Procedure 32 provides in pertinent part:

(c) Pre-sentence Investigation

> (c)(D) If comments of the Defendant and his counsel, or testimony or other information introduced by them allege any factual inaccuracy in the Pre-sentence Investigation Report or the Summary of the Report or part thereof, the Court shall, as to each matter controverted make (i) a finding as to the allegation or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account at sentencing. A written record of such findings and determination shall be appended to and accompany and copy of the Pre-sentence Investigation Report hereafter made available to

the Bureau of Prisons or Parole Commission.

In the instant case, the record is clear that the Court has thus far failed to comply with the requirements of Rule 32(c)(3)(D) in that it has failed to make findings of fact as to each and very matter disputed by the Defendant on the record prior to sentencing. It is the Defendant's position that he is entitled to such findings of fact once an evidentiary hearing has been held in order that the Court can determine the accuracy of the information to which the Defendant objects. It is further the Defendant's position that if said controverted matters are not corrected, that his due process rights with the United States Parole Commission may be significantly adversely affected in that the United States Parole Commission may be left to rely upon erroneous statements and inaccurate information which is still contained in the Pre-sentence Investigation Report in determining his parole guidelines.

In United States v. Velasquez, 748 F.2d 972, 974 (5th Cir. 1984), the Fifth Circuit expressly recognized the effect of an erroneous Pre-sentence Investigation Report beyond the impact on the sentencing judge. In this case, the court of

appeals for the Fifth Circuit found that the district court failed to comply with the procedural requirements of sentencing as set forth in Rule 32 of the Federal Rules of Criminal Procedure and ordered a new sentencing hearing. The Defendant would submit that the Velasquez decision removes any doubt that the District Court must response to a Defendant's objections to the Pre-sentence Investigation Report.

In this case at the Pre-sentencing Hearing, the District Court asked Velasquez whether there were any errors in the Pre-sentence Investigation Report. Velasquez's attorney objected to the label "notorious alien smuggler" used in the Pre-sentence Investigation Report to describe Velasquez. The District Court did not respond to the objection. In its decision in which it vacated Velasquez's sentence, the Court of Appeals held that the District Court violated procedural rules in imposing sentence where it did not respond to the objection to the label of "notorious alien smuggler" used in the Pre-sentence Investigation Report to describe the Defendant and held that this required reversal and a remand for resentencing.

The Defendant would also refer the Court to the case

of United States v. Eschweiler, 782 F.2d 1385 (7th Cir. 1986) at page 1388 where the Court of Appeals held that:

> If the defendant disputes a fact in the record, the requirements of subsection (D) are triggered...the sentencing judge is then obligated then either to make written findings concerning the disputed matter or a written determination that the disputed matter will not be relied on for sentencing and then attach it to the presentence report.

Accord U.S. v. Serino 835 F.2d 931 (1st Cir. 1987); U.S. v. Arefi, 847 F.2d 1003 (2nd Cir. 1988); U.S. v. Manni, 810 F.2d 80 (6th Cir. 1987); U.S. v. Peterman, 841 F.2d 1474 (10th Cir. 1988).

The purpose of Rule 32(c)(3)(D) are set out in United States v. Lawal, 810 F.2d 491 (5th Cir. 1987) in which the court stated at page 493:

> The rule serves two important functions:
>
> (1) It ensures that a defendant receives a fair sentence based on accurate information, and
>
> (2) it ensures that a clear record of the resolution of disputed facts is available.

Accord U.S. v. Garcia, 821 F.2d 1052 (5th Cir. 1987). Also see United States v. Hutador, 856 F.2d 995 (5th Cir. 1988).

As set forth in the Memorandum in Support of the

Defendant's Motion to Correct Pre-sentence Investigation Report, it is the Defendant's position that once a clear and specific objection to materially inaccurate information in the Pre-sentence Investigation Report is registered, the Government bears the burden of proof and production in substantiating the disputed pre-sentence investigation report allegations, at a minimum by the preponderance of the evidence. See McMillan v. Pennsylvania, 477 U.S. 79, (1986). Additionally, as set forth above since the Defendant has raised allegations concerning disputed information in the pre-sentence investigation report, the requirements of Federal Rules of Criminal Procedure 32(c)(3)(D) are triggered and the Court is required to comply therewith. To permit the Report to remain tainted by conclusory and factually unsupported allegations, the Defendant's efforts to be released on parole clearly will be frustrated and will result in grave injustice to the one process right of the Defendant.

Respectfully Submitted,

Burrell D. Johnston
1108 Nueces
Austin, Texas 78701
Telephone No. (512) 478-7381
Facsimile No. (512) 478-2044

State Bar No. 10848000

ATTORNEY FOR DEFENDANT
STANLEY E. ADAMS, JR.

CERTIFICATE OF SERVICE

By my signature affixed above, I, Burrell D. Johnston, hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to Dan H. Mills, Assistant U.S. Attorney for the Western District of Texas, Suite 650, First City Centre, 816 Congress Avenue, Austin, Texas, on this the 24th day of April, 1992.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

v.

STANLEY E. ADAMS, JR.

Defendant

CASE NO. A-90-CR-117(1)

ORDER

This matter is before the Court as the result of a Motion filed by counsel for the Defendant in the instant case pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure in which counsel asks the Court to make certain corrections to the Defendant's PSI. After consideration of the motion filed by counsel for the Defendant as well as conducting an evidentiary hearing in respect thereof, the Court at the Defendant's sentencing hearing held on February 20, 1992 ordered that certain modifications be made to the Pre-sentence Investigation Report.

App 9

At that time the Court ordered that all statements relative to the DeSoto (Witte and Ponderosa) property as well as the Parklane Apartments Project be deleted from the Victim Impact statement found on page 7 of the Pre-sentence Investigation Report. The Court also ordered that with respect to page 8 of the Victim Impact Statement, the language involving the total loss resulting from the conspiracy being $9,349,579 be deleted from the Pre-sentence Investigation Report. Further, with respect to the Remington House Apartment Project, the Court further found that the loss incurred as the result of the Defendant's participation in that transaction was in the amount of $78,750.

After further review of the revisions made by the United States Probation Office to the Defendant's Pre-sentence Investigation Report which have been made pursuant to the Court's order of February 20, 1992, and in order to insure that the Pre-sentence Investigation Report is revised in all respect to be consistent with the Court's previous findings,

It is HEREBY ORDERED that the Pre-sentence Investigation Report be further revised as follows:

1. At page 12 in the Evaluation Section, second paragraph, the Court orders that the last two sentences of the second paragraph be deleted.

2. Under the Sentencing Data Section of the Pre-sentence Investigation Report at page 12, the Court orders that the offense severity rating for the Defendant's case be changed from 6 to a category 4 in order to be consistent with the Court's previous finding of $78,750 in damages resulting form the Defendant's participation in the instant case.

3. Additionally at page 12 of the Pre-sentence Investigation Report under the Sentencing Data Section the Court orders that the guidelines for United States Parole Commission purposes be modified from 40 to 52 months to 12 to 18 months to be consistent with the Defendant's revised severity rating of 4 and correct salient factor score of 10.

Done and Ordered in Chambers in the United States Courthouse, Austin, Texas this _____ of March, 1992.

_____
James R. Nowlin
United States District Judge

Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1348

In the Supreme Court of the United States

OCTOBER TERM, 1993

STANLEY E. ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court violated Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to rule on all of petitioner's objections to his Presentence Report.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1348

STANLEY E. ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1A) is unpublished, but the judgment is noted at 5 F.3d 529 (Table).[1]

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. A petition for rehearing was denied on October 15, 1993. Pet. App. 1B. The petition

---

[1] Petitioner includes as Appendix 1 of his petition both the judgment order of the court of appeals affirming his conviction and sentence and the order of the court of appeals denying rehearing and rehearing en banc. We cite the judgment order as Pet. App. 1A and the order denying rehearing as Pet. App. 1B.

for a writ of certiorari was filed on January 18, 1994, and is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Western District of Texas to conspiring to defraud the United States, in violation of 18 U.S.C. 371, and making false entries in the records of a federally insured financial institution, in violation of 18 U.S.C. 1006. He was sentenced to four years' imprisonment, to be followed by five years of probation; ordered to perform 500 hours of community service; and fined $250,000. The court of appeals affirmed. Pet. App. 1A.

1. Petitioner was the Chairman of the Board of Directors and a member of the loan committee of Lamar Savings Association (Lamar), a financial institution insured by the Federal Savings and Loan Insurance Corporation (FSLIC) and supervised by the Federal Home Loan Bank Board (FHLBB). On June 19, 1985, the FHLBB sent Lamar a letter informing it that its net worth was inadequate. The letter stated that unless action was taken to increase Lamar's net worth, the FHLBB would begin supervising it. Presentence Report (PSR) 3; Stipulation of Facts 1-2.

To avoid FHLBB supervision, petitioner conspired with other officers and employees of Lamar to make false loans that artificially inflated Lamar's apparent net worth. Under that scheme, the conspirators arranged for Lamar to lend money to borrowers who used the money to buy real estate owned by Lamar.

Lamar sold the property to the borrowers for more than its fair market value and told them that they did not have to repay the loans. Both the proceeds of the sales and the false loans were reflected as assets in Lamar's records. As a result of the scheme, petitioner and his co-conspirators deceived federal bank examiners into believing that Lamar had a greater net worth than it actually had, and they thereby avoided FHLBB intervention. Based on the scheme, petitioner pleaded guilty to conspiring to defraud the United States. PSR 3-4; Stipulation of Facts 2.

In September 1985, as part of the scheme, Lamar loaned money to Vijay Parekh, a friend of petitioner and former officer of Lamar. Parekh used the money to buy the Remington House Apartments from Lamar at an artificially high price. The transaction inflated Lamar's apparent net worth by approximately $3 million. Based on the sale of the Remington House Apartments, petitioner pleaded guilty to making false entries in Lamar's financial records. PSR 6-7; Stipulation of Facts 2-4.

2. Petitioner's Presentence Report described the false record entries and sham loans that petitioner and his co-conspirators made to deceive the FHLBB. PSR 1-7; see Gov't C.A. Br. 8-10. In addition, it determined that petitioner and his co-conspirators caused a loss totaling $9,349,579. PSR 1. Before sentencing, petitioner submitted numerous written objections to the PSR. Pet. App. 2.

At the sentencing hearing on February 20, 1992, petitioner told the court that he had entered into a civil agreement with the Federal Deposit Insurance Corporation (FDIC) that relieved him of the obligation to pay restitution in the present criminal case.

2/20/92 Sentencing (Sent.) Tr. 6; see Amended Plea Agreement 3. He asked the court to add a reference to the agreement in the Victim Impact Statement (VIS) section of the PSR, which was the section of the PSR that discussed restitution. 2/20/92 Sent. Tr. 6. Petitioner also asked the court to amend the VIS to refer only to the $78,750 loss caused by the sale of the Remington House Apartments, and not to the total loss of $9,349,579. *Id.* at 9-19. The court agreed to do so. *Id.* at 18-19. Notwithstanding that amendment, the portion of the PSR that calculated petitioner's Salient Factor Score and his Offense Severity Rating—two ratings that affect a prisoner's eligibility for parole—continued to be based on the total loss of $9,349,579. See *id.* at 7, 17-19; PSR 7, 12.

Later in the sentencing hearing, petitioner asked the court to delete the reference to the $78,750 loss caused by the sale of the Remington House Apartments from the VIS portion of the PSR, but the court refused. 2/20/92 Sent. Tr. 19-20. Petitioner then stated he was satisfied with the PSR as it had previously been amended by the court.[2]

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[2] 2/20/92 Sent. Tr. 19-20:

> MR. HAYNES [petitioner's attorney]: Our position on that seventy-eight-five—seventy-eight-seven-fifty, if the court please, was previously articulated.
>
> THE COURT: I understand that, Mr. Haynes, and you've just gotten millions of dollars taken out of there. So let's move on. Seventy-eight-five is nothing compared to what was just taken out of it.
>
> MR. HAYNES: All right, Your Honor.
>
> THE COURT: I mean that's just a suggestion.

The court invited petitioner to allocute (2/20/92 Sent. Tr. 20) and gave petitioner's attorney another opportunity to speak (*id.* at 22). The court asked petitioner and his attorney whether there was "any legal reason why the court should not impose sentence at this time." *Id.* at 26. Petitioner and his attorney answered in the negative. *Ibid.* In imposing sentence, the court stated that it had "reviewed the record * * *, as well as the presentence investigation report." *Ibid.* The court stated that it was sentencing petitioner "[b]ased on that review and the information brought to the attention of the court at this hearing this morning." *Id.* at 26-27. At the end of the hearing, the court asked the parties whether it had "left out anything." *Id.* at 29. Petitioner did not make any additional claims regarding the PSR; his attorney stated: "All right, Your Honor. I think that then covers it." *Id.* at 30.

3. After the sentencing hearing, petitioner filed several motions asking the court for additional amendments to the PSR. On March 13, 1992, petitioner filed a "Motion for Clarification of Rule 32 Motion" (Pet. App. 4), which the court denied on April 16 (*Id.* at 7). On April 24, 1992, petitioner filed a "Supplement to Motion to Correct Pre-Sentence Investigation Report" (*id.* at 8), which the court granted in part on May 8, 1992 (App., *infra*, 1a-2a).

MR. HAYNES: And it's not a suggestion that goes unheeded, Your Honor. I think in response to the court's inquiry then as to the presentence investigation, Your Honor, I have no additional comments to make to the court in view of the court's corrections of the PS[R] as I saw it.

In its Order of May 8, 1992, the court required the probation department to amend the PSR to reflect the findings made at the February 20, 1992, sentencing hearing. Specifically, the court directed the probation department to delete the sentence "The total loss resulting from the conspiracy was $9,349,579" from the VIS portion of the PSR. App., *infra*, 2a. The court further ordered that "the Parole Commission should itself reassess the Report, in light of this deletion, in determining the offense severity rating for [petitioner]." *Ibid.* The court did not, however, order the probation department to amend petitioner's Salient Factor Score or his Offense Severity Rating; they continued to be based on the total loss of $9,349,579 caused by the conspiracy.

In an order dated October 14, 1992, the court made clear that it had not intended to amend the finding of the PSR that petitioner and his co-conspirators caused a total loss of $9,349,579. The court explained that it had meant merely to clarify that petitioner did not owe any restitution in addition to the restitution he had paid under his agreement with the FDIC.[3] The

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[3] Order of October 14, 1992, at 1-2 (App., *infra*, 3a-4a):

> The Court did not mean to suggest that [petitioner] caused no losses by his involvement in the conspiracy. The Court did expressly find that [petitioner] and the Government had settled the amount of restitution owing for all of the losses caused. Specifically, the Court found that [petitioner] owed no further restitution for losses resulting from the conspiracy. Although [petitioner's] conduct did contribute to the losses incurred, [petitioner] and the Government have agreed that [petitioner] has reimbursed the Government for his full share of those losses. Although extensive losses did result, [petitioner] does not owe any additional restitution for those losses. [Petitioner] has fully

court refused to alter the PSR's conclusion, reflected in petitioner's Offense Severity Rating and Salient Factor Score, that petitioner had caused a $9,349,579 loss. The court also explained that no such alteration was required by the court's instruction to the Parole Commission to reassess the PSR in light of the court's amendment of the VIS portion of the PSR. That instruction, the court said, indicated that "[t]he Parole Commission and the Bureau of Prisons should indeed consider as a factor favorable to [petitioner] that [petitioner] has made full restitution to the Government in the present action and that [petitioner] owes no further restitution to the Government in this action." App., *infra*, 4a.[4]

---

paid any restitution that he owed to the Government in this action.

[4] Petitioner states (Pet. 6) that "[o]n April 24, 1992, the District Court ordered that the appropriate correction be made to the Defendant's PS[R] in accord with the findings made on February 20, 1992 at the sentencing hearing. (Appendix 9)." Appendix 9 to the petition in this case purports to be an order requiring the probation department to amend petitioner's PSR so that his Salient Factor Score and Offense Severity Rating are based on a loss of $78,750, rather than a loss of $9,349,579. In fact, the district court did not issue that order. Counsel for petitioner has confirmed (App., *infra*, 5a-6a) that Appendix 9 is a copy of a *proposed* order that he submitted to the district court but that was never signed or otherwise adopted by the court. (In addition, the proposed order reproduced in Appendix 9 does not appear in the district court's file, perhaps because the original file in this case was lost and later reconstructed. See Docket Sheet 5 (entry of Nov. 9, 1992)).

The appendix to the petition contains two other proposed orders, not specifically designated as such, that were not signed or otherwise adopted by the district court. Beginning at page 6 of Appendix 5 is a proposed order appended to the govern-

4. On appeal, petitioner claimed that the district court had not resolved all of the disputed factual issues at sentencing, as required by Fed. R. Crim. P. 32(c)(3)(D). Pet. C.A. Br. 16-18. The court of appeals affirmed in an unpublished judgment order. Pet. App. 1A.

ARGUMENT

1. Petitioner renews his contention (Pet. 9-30) that the district court erred by failing to resolve all disputed factual issues at sentencing. That contention is without merit.

Under Federal Rule of Criminal Procedure 32(c)(3)(D), the district court was required, "as to each matter controverted" in petitioner's PSR, to "make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing."[5] In applying the rule, the courts of appeals have recognized that a defendant may waive objections to alleged inaccuracies in the Presentence Report by failing to raise them, and that he may withdraw an objection after it is made. See,

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ment's Response to petitioner's Motion for Clarification of Rule 32 Motion. Following page 8 of Appendix 8 is a proposed order filed with petitioner's Supplement to Motion to Correct the Pre-Sentence Investigation Report.

[5] Rule 32 was amended by the Sentencing Reform Act of 1984, but subsection (c)(3)(D) of the rule was not substantially altered. Sentencing Reform Act of 1984 (1984 Act), Pub. L. No. 98-473, Tit. II, ch. II, § 215(a), 98 Stat. 2014. The portion of the rule quoted in the text appears in both versions of the rule. The pre-amendment version of the rule applies to petitioner because he committed his crimes before November 1, 1987. 1984 Act § 235, 98 Stat. 2031.

e.g., *Martorana* v. *United States*, 873 F.2d 283, 284 (11th Cir. 1989) (per curiam) ("There is no question that [a] defendant can waive the requirements of Rule 32(c)(3)(D)."); *United States* v. *Hipolito-Sanchez*, 998 F.2d 594, 596 (8th Cir. 1993) (per curiam) ("Although [the defendant] objected to various portions of the PSR, * * * he withdrew his objections at the sentencing hearing. * * * Because [he] withdrew any objection he had to the PSR's determination * * *, he waived his right to challenge that [determination] on appeal."); *United States* v. *Mapp*, 990 F.2d 58, 60-61 (2d Cir. 1993); *United States* v. *Citro*, 938 F.2d 1431, 1441 n.18 (1st Cir. 1991), certs. denied, 112 S. Ct. 902, 112 S. Ct. 1997 (1992); *United States* v. *Scott*, 914 F.2d 959, 962 (7th Cir. 1990). Thus, the rule does not require the district court to make findings when a defendant raises an objection, but later withdraws it.

Contrary to petitioner's contention (Pet. 16), he withdrew his unresolved objections to the PSR at the sentencing hearing. Although petitioner filed numerous written objections to the PSR, he admitted at sentencing that "the substance of [his] objection" concerned the amount of the loss caused by his crimes "and assessing dollar figures there that [he did not] agree with." 2/20/92 Sent. Tr. 2-3; see also Pet. App. 3. With regard to that issue, the district court fully complied with Rule 32(c)(3)(D), upholding the PSR's finding that petitioner was responsible for causing a $9,349,579 loss, but concluding that because of petitioner's civil agreement with the FDIC, the VIS portion of the PSR should be amended to reflect only the $78,750 loss caused by the sale of the Remington House Apartments. After the district court made its determination concerning the loss at sentencing,

petitioner stated (2/22/90 Sent. Tr. 19-20): "[I]n response to the court's inquiry then as to the presentence investigation, Your Honor, I have no additional comments to make to the court in view of the court's corrections of the PS[R] as I saw it." Petitioner also indicated that there was no "legal reason why the court should not impose sentence at this time," *id.* at 26, and told the court at the end of the sentencing hearing that the court had not "left out anything," *id.* at 29. Thus, petitioner withdrew his unresolved objections to the PSR by confirming that the court could pronounce sentence without further factfinding. Accordingly, he cannot now claim that the district court erred by not conducting that factfinding. See *Hipolito-Sanchez*, 998 F.2d at 596; *Mapp*, 990 F.2d at 61.

2. The decision below does not conflict with any decision of this Court or of any other court of appeals.

Petitioner's reliance (Pet. 16) on *United States* v. *Caraza*, 843 F.2d 432 (11th Cir. 1988) (per curiam), and *United States* v. *Jones*, 972 F.2d 1345 (9th Cir. 1992) (Table), is misplaced.[6] Neither decision involved a defendant who withdrew his objections to the PSR. In *Caraza*, the defendant "orally raised a factual dispute" at the sentencing hearing, which "[t]he government concede[d]" was never resolved and involved facts on which the district court may have relied. 843 F.2d at 438. The court of appeals accordingly remanded the case for compliance with Rule 32(c)(3)(D). *Ibid.* In *Jones*, the defendant raised several objec-

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[6] Because the decision in *Jones*, No. 91-50786 (9th Cir. Aug. 27, 1992), is unpublished, it "shall not be regarded as precedent" under 9th Cir. R. 36-3. The text of the decision is available at 1992 WL 207902 and 1992 U.S. App. LEXIS 20798.

tions to the PSR but could not substantiate one of them at the sentencing hearing. The Ninth Circuit held that the objection was waived. The Ninth Circuit also determined, however, that the district court had failed to send a copy of the PSR to the Bureau of Prisons, and it remanded for completion of that "ministerial" task.

Nor does the decision below conflict with *United States* v. *Edgecomb*, 910 F.2d 1309 (6th Cir. 1990), as petitioner suggests (Pet. 23-24). There, the defendant filed written objections to the PSR before sentencing, and the PSR listed those objections as "UNRESOLVED OBJECTIONS." 910 F.2d at 1313. At sentencing, the court asked whether the defendant was "satisfied with the [PSR]" and the defendant answered in the affirmative. *Ibid.* The district court sentenced the defendant without resolving the objections listed in the PSR. The court of appeals agreed with the defendant that his failure to renew his objections to the PSR at the sentencing hearing was excusable "because a portion of the PSR already included his objections"; the court therefore remanded the case to the district court for more complete factual findings. *Id.* at 1313-1314.

Finally, petitioner is incorrect in asserting (Pet. 16-18) that the decision below conflicts with other decisions from the Fifth Circuit. The decisions on which petitioner relies (Pet. 14, 17, 19, 26, 27)—*United States* v. *Ramirez*, 963 F.2d 693, cert. denied, 113 S. Ct. 388 (1992); *United States* v. *Stouffer*, 986 F.2d 916, certs. denied, 114 S. Ct. 115, 114 S. Ct. 314 (1993); *United States* v. *Nnanna*, 7 F.3d 420 (1993) (per curiam); *United States* v. *Charroux*, 3 F.3d 827 (1993); *United States* v. *Billingsley*, 978 F.2d 861

(1992), cert. denied, 113 S. Ct. 1661 (1993); *United States* v. *Cockerham*, 919 F.2d 286 (1990)—are not inconsistent with the principle that a defendant may withdraw objections to his PSR. Moreover, any tension between the decision below and other decisions of the Fifth Circuit is a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

MAY 1994

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-90-CR-117(1)

UNITED STATES OF AMERICA

v.

STANLEY E. ADAMS

May 8, 1992

ORDER

Before the Court is the Defendant Adams' Supplement to Motion to Correct Pre-Sentence Investigation Report, filed April 24, 1992. Having reviewed and considered this motion, the Court is of the opinion that the motion should be GRANTED IN PART and DENIED IN PART.

IT IS ORDERED that the Pre-Sentence Investigation Report (the "Report") that has been filed with the Bureau of Prisons be AMENDED. At the Sentencing Hearing conducted before this Court on February 20, 1992, this Court ordered that certain corrections be made in the Report. Not all of those corrections were made. Specifically, the first sentence at the top of page 8 of the Report which states:

"The total loss resulting from the conspiracy was $9,349,579."

is HEREBY DELETED from the Report. This deleted sentence should in no way be considered by the Parole Commission. Additionally, the Parole Commission should itself reassess the Report, in light of this deletion, in determining the offense severity rating for the Defendant.

IT IS FURTHER ORDERED that the remaining issues raised in the Defendant's Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Order be transmitted to the Parole Commission and be attached to the Report.

SIGNED AND ENTERED this *8th* day of May, 1992.

/s/ JAMES R. NOWLIN
JAMES R. NOWLIN
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-90-CR-117(1)

UNITED STATES OF AMERICA

v.

STANLEY E. ADAMS

October 14, 1992

ORDER

Before the Court is the Defendant Adams' various motions for modification of sentence, and the supplements thereto, pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Having reviewed and considered these motions and the supplement thereto, the Court enters the following opinion.

This Court hereby seeks to clarify its previous rulings and findings in this case. The Court did not mean to suggest that Defendant Adams caused no losses by his involvement in the conspiracy. The Court did expressly find that Defendant Adams and the Government had settled the amount of restitution owing for all of the losses caused. Specifically, the Court found that Defendant Adams owed no further restitution for losses resulting from the conspiracy.

Although Mr. Adams [*sic*] conduct did contribute to the losses incurred, Mr. Adams and the Government have agreed that Mr. Adams has reimbursed the Government for his full share of those losses. Although extensive losses did result, Mr. Adams does not owe any additional restitution for those losses. Mr. Adams has fully paid any restitution that he owed to the Government in this action. The Parole Commission and the Bureau of Prisons should indeed consider as a factor favorable to Mr. Adams that Mr. Adams has made full restitution to the Government in the present action and that Mr. Adams owes no further restitution to the Government in this action.

IT IS ORDERED THAT Defendant Adams' motions to modify his sentence are DENIED.

IT IS FURTHER ORDERED that all other motions pending before this Court in this action are hereby DENIED.

IT IS FURTHER ORDERED that the Clerk transmit a copy of this Order the United States Parole Commission and to the Bureau of Prisons.

SIGNED AND ENTERED this *14th* day of October, 1992.

/s/ JAMES R. NOWLIN
JAMES R. NOWLIN
United States District Judge

APPENDIX C

U.S. Department of Justice
Criminal Division

Washington, D.C. 20530
Friday, April 22, 1994

Mr. Burrell D. Johnston
1108 Nueces
Austin, TX 78701
BY FAX: (512) 478-2044

Re: *Stanley E. Adams* v. *United States*
Supreme Court No. 93-1348

Dear Mr. Johnston,

This letter is to confirm our conservation of 4:30 pm today in which you informed me that Appendix 9 to the petition for a writ of certiorari in the above-referenced case is a proposed order that was not actually signed by the district court. If this conforms to your understanding of our conversation, please sign below and return this letter to me by fax at (202) 514-8232.

Thank you very much.

Sincerely,
/s/ DAVID S. KRIS

DAVID S. KRIS
Attorney
Criminal-Appellate
Section
Department of Justice
P.O. Box 899

Ben Franklin Station
Washington, D.C. 20044

/s/ BURRELL D. JOHNSTON
BURRELL D. JOHNSTON
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